87-1358

Supreme Court, U.S.
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CLERK

No.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

O'GWEN L. KING
DOROTHY C. KING,
Petitioners

vs.

RELIANCE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS TO BE REVIEWED

1. Does Rule 60(b)(1) and Rule 60(b)(6) of the Federal Rules of Civil Procedure authorizing relief from judgments, empower a District Court to relieve a party from the effect of an executed release on the grounds of "excusable neglect," chargable to the party seeking to set aside the release, and occurring after the execution of the release?

2. Alternatively, should the appropriate remedy for the effects of the releasor's neglect be the abrogation of the release between the parties with a concomitant reinstatement of the civil action, or should the releasor be relegated to its rights under the release?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

O'GWEN L. KING AND DOROTHY C. KING

Petitioners

vs.

RELIANCE INSURANCE COMPANY

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NOW COMES O'Gwen L. King and Dorothy C. King, by Michael A. Dessommes, Attorney, and prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above cause on October 1, 1987, rehearing denied on November 10, 1987.

OPINIONS BELOW

The judgment of the U. S. Court of Appeals for the 11th Circuit, rehearing

denied, and the judgment and Orders of the U.S. District Court for the Northern District of Florida, Pensacola Division were rendered without reported opinion, and are appended as appendices (A) through (E).

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the 11th Circuit was entered on October 1, 1987 and the application of Petitioners for rehearing was denied on November 10, 1987. The Jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTES INVOLVED

This case involves consideration of Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. Rule 60(b) is set forth in full as appendix (F).

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises out of a civil action originating in the United States District Court for the Northern District of Florida, Pensacola Division. Plaintiff Reliance Insurance Company, sued O'Gwen L. King and wife Dorothy C. King in the District Court with jurisdiction being founded upon a diversity of citizenship where the matter in controversy exceeded $10,000 pursuant to 28 USC §1332(a)(1). The action was for money damages arising out of a construction contract and the Plaintiff alleged that O'Gwen L. King and wife Dorothy C. King were liable as sureties for damages arising out of its breach.

In November 1984, the Kings entered into a settlement agreement (Appendix

G), whereby the dispute in litigation between the Kings and Reliance could be settled. By the terms of the settlement agreement, Reliance would receive $150,000 in settlement of the case on or before November 19, 1984 or alternatively the Kings could deliver collateral satisfactory to Reliance "conditioned to satisfy payment within 120 days of date". Upon payment, the settlement agreement contemplated a release of claims being executed.

Subsequently the Kings proffered collateral to secure the extended payment beyond November 19, 1984, which collateral was rejected by Reliance. An alternative solution was reached and on November 19, 1984 Mr. King arranged for and delivered a 120 day irrevocable letter of credit (Appendix H). In return Reliance gave an unconditional

Release unequivocally by its terms stating that it releases all claims and causes of action against the Kings (Appendix I). The Release by its express terms was a full and complete compromise, settlement, discharge, accord and satisfaction of any and all claims, and stated that it was given in consideration of the letter of credit. The expiration date of the letter of credit was March 19, 1985, the last day that the issuing bank was required to honor payment upon its presentation. Due to error of Reliance's counsel, it was not presented timely and consequently the bank did not honor payment upon the letter of credit. Reliance then demanded payment in the face amount of the letter of credit of $150,000, which the Kings declined to pay.

Meanwhile on April 4, 1985 the District Court entered an order of dismissal stating that the case was dismissed with prejudice but reserving to the court power to amend, alter or vacate the order of dismissal in the event the settlement was not consumated for any reason (Appendix C). Reliance moved to set aside the order of dismissal, and after hearing,the Court did in fact vacate the dismissal and reinstate the original action, conditioned to take effect if the Kings did not pay $150,000 within 20 days.

The Court's Order of December 31, 1985 (Appendix D) stated alternative grounds in support of its holding. The first was that the letter of credit was insufficient consideration for the Release. The District Court's rationale for this basis of its holding was

repudiated by Reliance on the appeal to the 11th Circuit , (see excerpt from brief filed on appeal by Reliance Insurance Company, Appendix J).

The alternative ground of the District Court's holding was that rule 60(b)(6) of the Federal Rules of Civil Procedure allows for the dismissal to be set aside on equitable grounds. Further stating that Rule 60(b)(1) allowed for relief from judgment in case of excusable neglect, the Court held that the lack of due diligence to present the letter of credit for payment was a "unilateral mistake" and excusable neglect, and under Florida law a unilateral mistake was a sufficient basis to set aside the contract of release.

Thereafter, the District Court rendered, on a Motion for Summary

Judgment, a judgment against the Kings in the principal sum of $350,000.00. The Court of Appeals for the Eleventh Circuit affirmed per curiam, without opinion.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The U. S. Court of Appeals has so far sanctioned a departure from the accepted and usual course of judical proceedings by the U.S. District Court in the latter's application of Rule 60(b) of the Federal Rules of Civil Procedure as to call for an excercise of this Court's power of supervision.

The Court of Appeals affirmed without written reasons, on the Kings appeal from the District Court judgment urged on the basis that the Release should not have been set aside. The Court's error consists in using Rule 60(b) as a new grounds for attacking a release.

As indicated in the Statement of the Case herein, the District Court based its decision upon two alternative rationales, but one was abandoned on

appeal by the appellee. The Court's remaining ground supporting its order vacating the order of dismissal and reinstating the law suit is its Rule 60(b) rationale. It is important to note that the order vacating the previous dismissal not only vacated the dismissal but also cancelled or rescinded the release and settlement. The real issue is not the court's power to vacate a judgment which was premised upon a pending settlement and release, but the court's power to rescind or cancel a release based on the doctrine of "unilateral mistake".

There is no equitable remedy of rescission for unilateral mistake where there is a clear, executed contract. Only instruments may be rectified, not the contract itself. Chalfonte Development Corporation v. Rosewin

Coats, Inc. 374 So.2d 618 (Fla. 4th DCA, 1979), Smith v. Caravasios, 96 Fla. 219, 118 So.10 (1928) 22 Fla. Jurisprudence, 2nd Equity §37 . Equity does not rectify contracts actually made, 22 Fla. Jurisprudence 2nd, Equity §14; Smith v. Caravasios, supra. Florida does have a doctrine of unilateral mistake which can be utilized to attack a contract, but the mistake must go to the formation of the contract and not to events subsequent to its formation. Langley v. Irons Land and Development Co., 94 Fla. 1010, 114 So. 769 (1927);Moore v. Wesley E. Garrison, Inc., 5 So.2d 259 (Fla. 1941); Hedges v. Lyseck, 84 So.2d 28, (Fla. 1955), 11 Fla. Jurisprudence, 2d Contract §36.

Moreover, unilateral mistake is never a sufficient basis for destroying a release, even when the mistake is to

the formation thereof, if the mistake results from lack of care and diligence. Dean v. Lifter, 336 So.2d 393, (Fla. 3rd DCA, 1976). The District Court's action in throwing out a release creates an extremely dangerous precedent, and vests the court with an awesome carte blanche discretionary power, under provisions of a procedural rule designed to relieve inequities in the procurement and effects of the entry of judgment, to impose its perception of an equitable result regardless of substantive principles of the law governing the formation of contracts and releases.

The leading case dealing with the outer limits of Rule 60(b) is Ackermann v. United States 71 S.Ct. 209, 340 US 193, 95 L. Ed. 207 (1950). In denying relief under 60(b), the Supreme Court indicated that "free, calculated,

deliberate choices are not to be relieved from". Accord, Weilbacher v. J. H. Winchester & Co., 197 F.2d 303 (2nd Cir. 1952). As stated in Rarick v. United Steel Workers of America, 202 Fed Supp 902 (W. D. Penn. 1962), 60(b) does not provide relief to a party to a stipulation made the basis of judgment because of mistake or excusable neglect as to subsequent consequences. Ackerman v. U.S. supra., Sampson v. Radio Corporation of America, 434 F.2d 315 (2nd Cir. 1970) Master Key Anti Trust Litigation 76 FRD 460 (DC Conn. 1977) affirmed 580 F.2d 1045; Nemaizer v. Baker 793 F.2d 58 (2nd Cir. 1986).

The letter of credit was irrevocable by its terms and introduced an obligation on the part of a third party, a stable financial institution, to pay $150,000.00 within 120 days,

which obligation could not be revoked or dishonored as long as the requisite formalities for presentment were observed.

The scenario is: first, the settlement agreement dated November 8, 1984 provided that a release would be given should payment of $150,000.00 be made by the Kings on November 19, 1984. Secondly, it provided that in the event only collateral was given, no release would be given until final payment was made. Third, on November 19, 1984 the Release was delivered, expressly stating that it was in consideration of the letter of credit.

The petitioners argue the position that full payment has been made by the letter of credit; alternatively, and granting arguendo that under the entire agreements of the parties, to wit; the

settlement agreement and the Release, payment was still owed by the Kings after the destruction of the letter of credit by Reliance's own mistake, the appropriate remedy is not to reinstate the original action, but to relegate the parties to their rights under the release.

In view of the unequivocal language of the Release, it cannot be abrogated, since there was no flaw to its formation. Settlements are highly favored and whenever possible the courts are to give full effect to them. Pearson v. Ecological Science Corporation, 522 F.2d 171 (5th Cir. 1975) Lotspeich v. Neogard Corp. 416 So.2d 1163 (Fla. 3rd DCA 1982). In addition, they are an accord and satisfaction of previous claims. D. H. Overmeyer Co., v. Loflin, 440 F.2d 1213 (5th Cir. 1971); cert. denied, 404 U.S.

851, 92 S.Ct. 87, 30 L.Ed. 2d 90 (1971); (That case involved a unilateral mistake, but the mistake was not to the formation of, so could not vitiate, the settlement). W. J. Perryman & Co. v. Penn Mutual Fire Ins. Co. 324 F.2d 791 (5th Cir. 1953); holding that a release bars all claims settled therein.

A release merges all former obligations into the settlement represented by the Release and conclusively resolves all prior claims. Mulhern v. Rogers 636 Fed Supp. 323 (S. D. Fla. 1986). Sotile v. Gaines Construction Co. 281 So.2d 558 (Fla. 3rd DCA 1973); Bellefonte Insurance Co. v. Queens 431 So.2d 1039 (Fla. 4th DCA 1983) Pettinelli v. Danzig 722 F.2d 706 (11th Cir. 1984). Therefore, it is inappropriate to destroy the Release executed pursuant to the settlement

agreement, even if payment can be said to be still owed under the Release after the destruction of the letter of credit by the payee, because the Release completely terminated all former obligations from the Kings to Reliance.

Absent the Release which perfected the executory settlement, vacation and reinstatement, if warranted by the facts could have been proper. Where there is a valid release, however, the remedy is for enforcement, rather than its destruction, although there is a split in the federal courts, as to whether the enforcement should be within the pending action or in a separate action. See, ARO Corporation v. Allied Witan Co., 531 F.2d 1368 (6th Cir. 1976) Harman v. Pauley, 678 F.2d 479 (4th Cir. 1982); Fairfax County Wide Citizens Ass'n v. County of Fairfax, 571 F.2d 1299 (4th

Cir. 1978). Cahill v. Arthur Anderson & Co. 659 Fed Supp. 1115 (S.D.N.Y. 1986), Aff. 822 F.2d 14.

As stated in Wallace v. Townsell 471 So.2d 662 (Fla. 5th DCA 1985).

> "The Settlement Agreement itself established the parties' legal rights under it. The Order approving it has more value as proof of the agreement than it has legal efficacy. The judgment based on the parties' settlement agreement did not vest the court with jurisdiction to permit the court to modify the terms of the parties' agreement..."

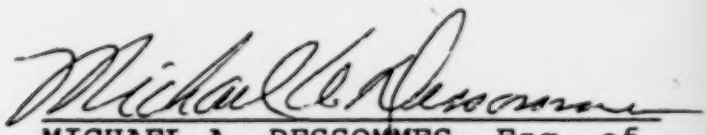
Settlements are binding not only on the parties involved but on the courts. Dorson v. Dorson 393 So.2d 632 (Fla 4th DCA 1981).

In conclusion, the Court of Appeals by means of its per curiam decision, without opinion, in a manner both as to application and as to the remedy

provided thereupon ruled in a way that is in conflict with prior cited decisions treating the effect of a release.

WHEREFORE, Petitioners respectfully requests for the reasons above stated, that the Petition for Certiorari be granted.

Respectfully submitted,



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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-3095

D. C. Docket No. 84-4018

RELIANCE INSURANCE COMPANY,
Plaintiff-Appellee,

versus

O'GWEN L. KING and DOROTHY C. KING,
Defendants-Appellants,

C. D. HAWKINS, et al.,
Defendants.

Appeal from the United States District Court for the Northern District of Florida.

(October 1, 1987)

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

Appendix "A"

"Costs taxed against defendants-appellants."

Judgment Entered: October 1, 1987

For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: December 4, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-3095

RELIANCE INSURANCE COMPANY,
Plaintiff-Appellee,

versus,

O'GWEN L. KING and
DOROTHY C. KING,
Defendants-Appellants,

C. D. HAWKINS, et al.,
Defendants.

Appeal from the United States District Court for the NORTHERN DISTRICT OF FLORIDA.

ON PETITION(S) FOR REHEARING

(November 10, 1987)

BEFORE TJOFLAT AND KRAVITCH, Circuit Judges and TUTTLE, Senior Circuit Judge.

Appendix "B"

PER CURIAM:

The Petition for rehearing filed by appellants is denied.

ENTERED FOR THE COURT

/s/ PHYLLIS KRAVITCH
United States Circuit Judge

Entered November 10, 1988

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

RELIANCE INSURANCE COMPANY,
a Pennsylvania corporation,

Plaintiff

v. PCA 84-4018-RV

O'GWEN L. KING, DOROTHY C.
KING, et al.,

Defendants.
----------/

ORDER OF DISMISSAL

The court having been advised that this matter has been compromised and settled between the parties, it is

ORDERED:

(1) This cause is hereby dismissed with prejudice, and without taxations of costs.

(2) In the event settlement is not consumated for any reason, the court reserves the power, upon motion filed by any party within 60 days after this

date, to amend, alter or vacate and set aside this order of dismissal.

DONE AND ORDERED this 4th day of April, 1985.

/s/ROGER VINSON
United States District Judge

Entered April 4, 1985

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

RELIANCE INSURANCE COMPANY,
a Pennsylvania corporation,

Plaintiff

v. PCA 84-4018-RV

O'GWEN L. KING, DOROTHY C.
KING, et al.,

Defendants.
----------/

ORDER

Plaintiff, Reliance Insurance Company (Reliance) has moved to set aside a dismissal entered by this Court (doc. 100), on the grounds that the settlement upon which the dismissal was based has not been perfected. In opposition to plaintiff's motion, defendants O'Gwen L. King and Dorothy C. King have raised a release which they contend unambigously bars any further litigation of the dispute. An

evidentiary hearing was held July 26, 1985. Determination of the motion was postponed, however, pending the filing of briefs by both sides addressing newly raised parol evidence issues.

Facts

This litigation was initiated to recover damages that Reliance claims to have sustained as surety on performance bonds securing construction contracts. In November of 1984, Reliance entered into and executed a settlement agreement with four of the defendants, Mr. and Mrs. King and Mr. and Mrs. Hawkins. The agreement, in general, provided for payment of $150,000 by both the Kings and the Hawkins on or before November 19, 1985, at which time a release would be furnished. As an alternative, a deferred payment plan was also set out

in the settlement agreement.[1] Interest under the deferred payment plan would accrue after 60 days.

On November 19, 1984, the Kings furnished Reliance with a $150,000 letter of credit which, on its face, provided for negotiation on or before March 19, 1985.[2] As a condition precedent to collecting on the letter of

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[1]In the event payment is not made within 120 days under this paragraph, Reliance may, at its option, proceed in the above-referenced action, which shall release its security interest in any collateral provided hereby and shall render this entire agreement null and void. Should Reliance elect to proceed with the action it shall return any documents given in connection with said collateral and shall execute any documents necessary to effectuate the release of this collateral.

[2]Testimony at the evidentiary hearing revealed that the letter of credit was presented on short notice on November 19, 1984, after Reliance refused to accept a mortgage on the Kings' beach proprety as collateral for deferred payment.

credit, however, a statement from Reliance establishing that the Kings were "in default" was required, which effectively made the letter of credit negotiable only after March 19, 1985. In short, March 19, 1985, was the 120th day under the settlement agreement and the last day for the Kings to pay the $150,000. Since the Kings could not be in default until after March 19, it was apparent that there was a problem with using the letter of credit as security.

Upon receipt of the defendants' letter of credit, Reliance executed a full release in favor of Mr. and Mrs. King which, by its terms, was given in consideration for the irrevocable letter of credit. It is the intended effect of this release that is fundamental to a determination of plaintiff's motion to set aside the dismissal.

During the week of March 19, 1985, Reliance furnished the necessary letter of default to be tendered with the letter of credit, in anticipation of the March 19 deadline. Plaintiff's local counsel (Nickinson) wrote to the Kings reminding them that a payment was due, and that in the event it was not furnished prior to the 19th, it should be delivered before 3:00 p.m. on the 19th.

Reliance's counsel (Nickinson) alerted his secretary that a payment was due from the Kings on the 19th. She was instructed to present the letter of credit to the bank if the payment was not delivered before 3:00 p.m. A check was received from Mr. King's office at or around 3:00 o'clock, but the check was in the amount of $3,000, not the anticipated $150,000. The letter of

credit was not timely presented to the bank for negotiation because the secretary erroneously believed the awaited payment had been received.[3]

Plaintiff asserts that the dismissal must be set aside, and the release rescinded. Plaintiff argues that the letter of credit was only collateral presented by the Kings pursuant to the security agreement, and the release was conditional and did not extinguish the underlying debt of $150,000. Reliance stresses that support for its position is abundantly clear when the security agreement, the letter of credit, and the release are read in pari materia. The parol evidence rule, it suggests, is no bar to

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[3]Counsel was unexpectedly delayed at a hearing in another matter and was not, therefore, present in his office during the afternoon of March 19, 1985

viewing the entire settlement transaction and only upon an examination of the documents together can the parties' true intent be discerned.

The Kings, in opposition, claim they hold an unconditional release, and Reliance's failure to negotiate the letter of credit has no effect on the validity or integrity of the release. Moreover, the Kings maintain that the failure to timely present the letter of credit amounts to inexcusable neglect or negligence, and is an insufficient ground for setting aside the dismissal. Finally, the Kings contend that the parol evidence rule bars the Court from examining extrinsic evidence because the release is an unambiguous document emobdying the full and final agreement between the parties. Any contrary understanding as to the nature of the

release is, the Kings contend, at best an erroneously held unilateral mistake on the plaintiff's part, insufficient to upset the dismissal order.

The Law

Rule 60(b)(6), Federal Rules of Civil Procedure, provides, in part, that a party can obtain relief from a final judgment, order or proceeding for any reason justifying relief from the operation of the Judgment. It is a discretionary determination [United States v. Sparks, 685 F.2d 1128 (9th Cir. 1982], and a motion thereunder is an appropriate means of attacking a judgment when problems arise in the underlying settlement. Harman v.

Pauley, 678 F.2d 479 (4th Cir. 1982).[4]

The most obvious question raised in the present case is whether a settlement was effected between the parties upon which this Court could enter a dismissal. Plaintiff suggests that the agreement to settle was reached, but never perfected through excusable neglect; therefore, it should be able to proceed with the litigation. Defendants King, on the other hand, claim the release unambiguously and unequivocally indicates that the matter was settled.

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[4]In Harman, the Fourth Circuit approved the use of Rule 60(b)(6) when the terms of a settlement have been breached but ordered the litigants to file suit to enforce the settlement rather than re-open the underlying litigation because the settlement agreement contained a clause awarding costs and attorney's fees if enforcement of the settlement was required. Here, because the settlement itself is challenged, the proper avenue is Rule 60(b)(6).

The release does, indeed, clearly state that it was given in consideration for the irrevocable $150,000 letter of credit. However, a close examination of the letter of credit itself demonstrates that it was not sufficient consideration to support the release.

The letter of credit was designed to be negotiable only upon the satisfaction of a specifically delineated condition precedent---default by defendant King on the $150,000 payment. Furthermore, the default had to be substantiated by Reliance, in writing, and presented simultaneously with a letter of credit. Because King could never be "in default" on his $150,000 payment under the settlement agreement until expiration of the 120 days (i.e., after March 19, 1985), the letter of credit could not properly have

been negotiated on March 19, 1985. The letter of credit was, therefore, a nullity and the release invalid for want of consideration.

Even if the release is construed to be valid, however, I am convinced that the dismissal would have to be set aside. While one court has interpreted the "for any reason" clause of Rule 60(b)(6), Federal Rules of Civil Procedure, as requiring demonstration of the existence of exceptional circumstances, [United States v. Sparks, supra,] the guiding principle is that the rule "makes available those grounds which equity long recognized as basis for relief." Bros., Inc. v. W. E. Grange MFTG. Col, 320 F.2d 594 (5th Cir. 1963). Thus, while respect for judgments inherently entails an appreciation of and aspiration toward finality, equity allows consideration of other, often

equally compelling policies.

Examining the security agreement, the letter of credit, and the lease in light of the surrounding circumstances as set out at the evidentiary hearing,[5] I conclude that the parties intended the matter to be closed either upon payment of the $150,000 by March 19, 1985 or upon negotiation of the

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[5]While parol testimony is inadmissible to vary or contradict the terms of an unambiguous written instrument. [Jackson v. Parker, 15 So.2d 451 (Fla. 1943], the rule does not prevent an examination of documents that are incorporated by reference. Once the letter of credit was recited as consideration in the release, its terms and provisions were automatically incorporated by reference and are the proper subject of inquiry. See, Day v. United States, 245 U.S. 159 (1917). Furthermore, parol testimony is admissible to demonstrate that documents are part of one overall transaction, Jackson, supra, and to explain ambiguities in documents intended to comprise an integrated agreement.

letter of credit in absence of such payment. The issue then, becomes, whether, assuming the validity of the letter of credit and, therefore, the validity of the release, the failure to timely present the letter of credit for negotiation at the bank on March 19, 1985, is a sufficient reason to set aside the order of dismissal.

Hindsight, as the defendants point out, facilitates a wiser evaluation of events as they were, and certainly emphasizes other steps that could have been taken to assure the timely negotiation of the letter of credit upon

default by defendants King.[6] The lack of diligence, however, is simply not of the sort to warrant a refusal to remedy what amounts to a $150,000 windfall for the Kings on the basis of a fortuitous event. Equity, therefore, would dictate setting aside the dismissal to avoid unjust enrichment of the Kings and to avoid what would be tantamount to a penalty against Reliance. Under Rule 60(b)(1), Federal Rules of Civil Procedure, excusable neglect constitutes a ground for relieving a party from a final judgment. In

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[6]Defendants rely on BMW of North America v. Krathen, 10 F.L.W. 1452 (Fla. 4th D.C.A., June 21, 1985), to illustrate that the dismissal cannot be set aside for inexcusable neglect of counsel. The court found that the attorney's behavior "evidences a total lack of forethought and such poor draftsmanship as to be well below accepted professional standards." I do not find counsel's conduct in this case to be of that nature.

Florida, unlike most states, a contract may be set aside on the basis of a unilateral mistake, unless the mistake is the result of an inexcusable lack of due care or the other party has so changed its position that rescission would be unconscionable. Maryland Casualty Co. v. Krasnek, 1740 So.2d 541 (Fla. 1965); Pennsylvania National Mutual Casualty Insurance Co. v. Anderson, 445 So.2d 612 Fla. 3d D.C.A., review denied, 453 So.2d 43 (Fla. 1984). The actions of Reliance's local counsel and his secretary do not fall outside the generally accepted practices and amenities of the local bar. See Smiles v. Young, 271 So.2d 798 (Fla. 3d D.C.A.), cert. denied, 279 So.2d 305 (1973); Kash N' Karry Wholesale Supermarkets v. Garcia, 221 So.2d 786 (Fla. 2d D.C.A. 1969). Here, there is

no evidence of any significant change of position by the Kings that would make it unconscionable not to set aside the judgment.

Accordingly, the motion to set aside the settlement and the order of dismissal is GRANTED, but if the $150,000 payment ismade within 20 days hereof, without additional interest, the dismissal order shall remain intact.

DONE AND ORDERED this 31st day of December, 1985.

/s/ ROGER VINSON
United States District Judge

Entered: December 31, 1985

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

RELIANCE INSURANCE COMPANY,
a Pennsylvania corporation,

Plaintiff

v. PCA 84-4018-RV

O'GWEN L. KING, DOROTHY C.
KING, et al.,

Defendants.
----------/

FINAL SUMMARY JUDGMENT

This cause having been presented on Reliance Insurance Company's motion for final summary judgment against O'Gwen L. King and Dorothy C. King, and the Court having been fully advised in the premises, and the motion granted for reasons set forth in the order of even date herewith; it is

ORDERED AND ADJUDGED that Reliance shall have and recover from the defendant's O'Gwen L. King and Dorothy

C. King, jointly and severally, the sum of Three Hundred Fifty Thousand Dollars ($350,000.00), for which let execution issue.

DONE AND ORDERED this 9th day of January, 1987.

/s/ROGER VINSON
United States District Judge

Entered January 9, 1987

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis,

audita querela and bills of review and bills in nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

SETTLEMENT AGREEMENT

The undersigned parties, Hawkins Concrete Construction Company, C. D. Hawkins, Beverly Hawkins, O'Gwen King, Dorothy King, and Reliance Insurance Company agree to settle all matters in controversy between them as follows:

In exchange for delivery of a stipulation for dismissal of its counterclaim in Case No. PCA 84-4018-RV, presently pending in the United States District Court, Northern District of Florida and a release of all claims by it running to Reliance Insurance Company, and the payment of $150,000.00 by C. D. Hawkins and Beverly Hawkins and $150,000.00 by O'Gwen King and Dorothy King for a total payment of $300,000.00 paid to Frank Bozeman, Esquire, attorney for Reliance Insurance Company at his

offices in Pensacola, Florida on or before 5:00 P.M. local time, November 19, 1984, Reliance Insurance Company will release the indemnity and any and all other claims it has or may have against C.D. Hawkins, Beverly Hawkins, O'Gwen King, Dorothy King and Hawkins Concrete Construction Co. and forthwith dismiss its claim with prejudice in the above-referenced court.

It is the intention of the parties that the payment of $150,000.00 in accordance with the foregoing by Mr. or Mrs. King shall release Mr. and Mrs. King from any and all claims regardless of performance by Mr. and Mrs. Hawkins. Similarly, payment of $150,000.00 in accordance with the foregoing by Mr. or Mrs. Hawkins shall release Mr. and Mrs. Hawkins regardless of performance by Mr. and Mrs. King.

In lieu of a cash payment on said date and time, C. D. and Beverly Hawkins and/or O'Gwen and Dorothy King may deliver collateral satisfactory to Reliance Insurance Company in the amount of $150,000.00 for Mr. and Mrs. Hawkins and/or in the amount of $150,000.00 for Mr. and Mrs. King conditioned to satisfy payment within 120 days of date. In the event payment is deferred as provided in this paragraph, filing of dismissal by Reliance will be delayed until payment is complete. In the event payment is not made within 120 days under this paragraph, Reliance may, at its option, proceed in the above-referenced action, which shall release its security interest in any collateral provided hereby and shall render this entire agreement null and void. Should Reliance elect to proceed with the

action it shall return any documents given in connection with said collateral and shall execute any documents necessary to effectuate the release of this collateral. Provided, Reliance may retain the wage claim and the epoxy claim and proceed against the collateral provided by the individuals by giving an unconditional release of any and all claims to the named individuals and to Hawkins Concrete Construction Co., Inc.

If payment is made beyond sixty (60) days from date, interest shall accrue at the rate of twelve percent (12%) per annum commencing on the sixty-first (61st) day from date until paid.

As further consideration for this agreement, Hawkins Concrete Construction Co., C. D. and Beverly Hawkins and O'Gwen and Dorothy King individually

hereby relinquish any and all entitlement to the so-called wage claim and epoxy claim against the United States Navy arising out of the Norfolk Pier Project.

Signed and dated this 8th day of November 1984.

HAWKINS CONCRETE CONSTRUCTION CO., INC.

By: /s/ Tom Gurr, President
/s/ Beverly Hawkins

RELIANCE INSURANCE COMPANY

By: /s/ James E. Crowder, Jr.,
Its attorney

/s/ O'Gwen L. King
/s/ C. D. Hawkins
/s/ Dorothy C. King

NO. 601

IRREVOCABLE CREDIT

THE CITIZENS AND PEOPLES NATIONAL BANK
OF PENSACOLA

Reliance Insurance Company
c/o Carlton, Fields, Ward, Emmanuel
Smith & Cutler, P.A.
P.O. Box 12426
Pensacola, FL 32582

Pensacola, Florida, November 19, 1984

Attn: Mr. Frank Bozeman, Attorney

DEAR SIRS:

WE HEREBY AUTHORIZE YOU TO DRAW ON US FOR ACCOUNT OF O'GWEN L. KING AND DOROTHY C. KING UP TO AN AGGREGATE AMOUNT OF ONE HUNDRED FIFTY THOUSAND and no/100 ($150,000.00) US DOLLARS AVAILABLE BY DRAFT(S) AT SIGHT.

ACCOMPANIED BY: Your statement signed by an authorized official of Reliance Insurance Company stating that O'Gwen L. King and Dorothy C. King have defaulted on their payment of $150,000.00 within

one hundred and twenty (120) days after the date of this Letter of Credit; and that the amount drawn hereunder represents the unpaid and past-due amount owed by O'Gwen L. King and Dorothy C. King.

Except as otherwise expressly stated, this credit is subject to the Uniform Customs and Practices for Commercial Documentary Credits (1974 Revision) fixed by the International Chamber of Commerce, Brochure No. 290.

EACH DRAFT MUST STATE IT IS DRAWN UNDER **THE CITIZENS AND PEOPLES NATIONAL BANK OF PENSACOLA**, PENSACOLA, FLA., CREDIT NO. 601 DATED November 19, 1984.

THE AMOUNT OF EACH DRAFT DRAWN UNDER THIS CREDIT TOGETHER WITH THE DATE OF NEGOTIATION MUST BE ENDORSED ON THE REVERSE HEREOF, AND THE PRESENTATION OF

EACH DRAFT SHALL BE A WARRANTY BY THE NEGOTIATING BANK THAT SUCH ENDORSEMENT HAS BEEN MADE.

WE HEREBY AGREE WITH THE DRAWERS, ENDORSERS AND BONA FIDE HOLDERS OF DRAFTS DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS CREDIT THAT THE SAME SHALL BE DULY HONORED ON PRESENTATION AND DELIVERY OF DOCUMENTS AS SPECIFIED AT PENSACOLA, FLORIDA, IF NEGOTIATED ON OR BEFORE MARCH 19, 1985.

YOURS VERY TRULY,

THE CITIZENS AND PEOPLES
NATIONAL BANK OF PENSACOLA

/s/L. A. DOMAN, PRESIDENT

RELEASE

STATE OF FLORIDA

COUNTY OF ESCAMBIA

KNOW ALL MEN BY THESE PRESENTS that RELIANCE INSURANCE COMPANY, on behalf of its heirs, successors and assigns, and any persons, firms or corporations claiming by or through us, consideration for an irrevocable credit in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) from The Citizens and Peoples National Bank of Pensacola in favor of Reliance Insurance Company for the account of O'Gwen L. King and Dorothy C. King, dated November 19, 1984 accepts that letter in full compromise, settlement, payment, discharge, accord and satisfaction of and from any and all claims, demands, rights, actions and causes of action, known or unknown, which it may now or hereafter have or

claim against O'Gwen L. King and Dorothy C. King, who may be or become liable to Reliance Insurance Company for any reason, for or on account of any and all loss, damages, injuries, or expenses of whatsoever kind which may have been sustained by it in person, rights, property or otherwise, directly or indirectly regarding all claims arising under agreements of indemnity dated June 21, 1982, November 10, 1982 and any other claims, actions or causes of action, of any description, known or unknown.

In consideration of the said letter of credit, RELIANCE INSURANCE COMPANY does hereby fully release, acquit and discharge O'Gwen L. King and Dorothy C. King of and for any and all such claims, demands, rights, actions and causes of action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this the 19th day of November 1984.

RELIANCE INSURANCE COMPANY
By: /s/ Edward P. Nickinson, III
Its Attorney

STATE OF FLORIDA, COUNTY OF ESCAMBIA

Before me the undersigned authority, a Notary Public in and for said State and County, personally appeared EDWARD P. NICKINSON, III, who is Attorney for RELIANCE INSURANCE COMPANY, known to me to be the person described by said name, who acknowledged to me that he executed the above and foregoing release instrument for the uses and purposes therein expressed.

Given under my hand and official seal this the 19th day of November, 1984.

/s/ Debra H. Sincere
NOTARY PUBLIC
My Commission Expires: 5/5/88
(SEAL)

Excerpt from brief on Appeal Filed by Reliance Insurance Company, (p. 27).

5/ Specifically, the district court found that, because the letter of credit could not be presented for payment without a statement from Reliance declaring King to be in default of his $150,000 payment, and such a statement technically could not be made until after March 19, 1985, the letter of credit was a nullity. Because the letter of credit was a nullity, it could not constitute consideration for Reliance's release. Reliance is constrained to point out to this Court that it did not assert this argument before the district court because of Nickinson's letter to King dated November 19, 1984. [R4-42-44, Exhibit 4]. [Appendix: 6]. It is well-settled, however, that a lower court's holding

must be affirmed on appeal if the result is correct, although the lower court relied on the wrong ground or stated a wrong reason. S.E.C. v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed.2d 626 (1943).